88-224

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MICHAEL T. HULL,

Petitioner

vs.

ATTLEBORO SAVINGS BANK,

Respondents

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME JUDICIAL COURT OF

MASSACHUSETTS

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76pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a court may summarily dismiss an incompetent mortgagor's due process claim under Covey v. Somers, 351 U.S. 141 (1956) where the affidavit and deposition testimony allege that the mortgagee knew of his incompetence at the time of the court-sanctioned foreclosure and he was later adjudicated to have then been insane?

2. Alternatively, whether the rule of Covey v. Somers should be extended to an unrepresented, incompetent mortgagor where his incompetence was not known to the mortgagee or the state court but was subsequently adjudicated?

3. Alternatively, whether the Covey rule should be clarified so as to place

the burden on a foreclosing creditor to show that it did not know of the debtor's incompetence?

STATUTES AND AUTHORITIES

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

The petitioner, Michael T. Hull, respectfully prays that a writ of certiorari issue to review the judg-

ment of the Supreme Judicial Court of Massachusetts entered on April 28, 1988.

OPINIONS BELOW

The Supreme Judicial Court of Massachusetts entered its decision, without opinion, denying further appellate review of the petitioner's appeal on April 28, 1988. A copy of the decision is attached as Appendix A. 402 Mass. 1102, ____N.E.2d ____ (1988).

The Massachusetts Appeals Court entered a memorandum decision, affirming the entry of summary judgment against petitioner, on October 30, 1987. A copy of the memorandum and order are attached as Appendix B. 25 Mass.App.Ct. 1104, 514 N.E.2d 864 (1987).

On rehearing, the Appeals Court entered a modified decision on February 23, 1988. A copy of the opinion and order is attached as Appendix C. 25 Mass.App.Ct. 960, 519 N.E. 2d 775 (1988).

The Massachusetts Trial Court, Superior Court Department, entered an unreported memorandum decision, granting summary judgment against the petitioner on all claims, on February 25, 1986. A copy of the memorandum and order is attached as Appendix D.

JURISDICTION

On April 28, 1988 the Supreme Judicial Court entered a judgment denying petitioner's application for further appellate review of his

appeal. App. A.[1] The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1257(3).[2]

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

The petitioner brought a pro se civil action in 1985 to set aside the October 1982 foreclosure of a bank mortgage on his home. He alleged in his complaint and an amended

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[1] See Title 28 United States Code, section 2101(c).

[2] No other petitioner is involved in this petition. The additional respondents are Edward F. Casey, Edward J. Casey and Maria Y. Casey.

complaint that he was adjudicated in 1984 to have been mentally incompetent from 1980 to 1984; that the foreclosing bank knew at the time of the foreclosure that he was incompetent; that the defendant purchasers of the property also knew of his incompetence; and that the sale price was only half of the fair value of the house.

The foreclosure sale was conducted pursuant to an authorizing judgment of a state court. Based upon this state action, and relying upon the authority of Covey v. Somers, 351 U.S. 141 (1956), the petitioner's complaint and amended complaint claimed, inter alia, that the foreclosure sale was invalid because his federally protected right to due process of law had been

violated in the circumstances, in that no guardian had been appointed to protect his property interests in the foreclosure proceeding.

The petitioner's complaint also alleged various state-law grounds for setting aside the foreclosure, which are not the subject of this petition.

The defendants moved for summary judgment on the basis of the pleadings and excerpts from the petitioner's pro se deposition.

The petitioner filed affidavits in opposition to summary judgment. In the affidavits and in his deposition testimony, he and others alleged as follows on the issue of his incompetence (Appendices E, F):

1. That two months before the sale, one Richard Costa, an agent of the second mortgagee,

had told an officer of the foreclosing first mortgagee that the petitioner was "mentally ill," "crazy", and "not playing with a full deck." App. F, pp.F-1, F-2.

2. That the respondent and ultimate purchaser, Edward F. Casey, had stated before the foreclosure sale to one Robert Pontarelli that the petitioner was "crazy." App. E, pp. E-2, E-3.

3. That, in the two months preceding the foreclosure sale, a local newspaper had reported that the petitioner had been indicted for various crimes, held without bail for psychiatric evaluation, and hospitalized for "emotional

problems" and depression.

App. C.

4. That he was adjudicated in 1984 to have been insane since March 1980 and continuing until the 1984 adjudication.

The respondent Attleboro Savings Bank, which had foreclosed its first mortgage, filed no affidavits to deny that it had known of petitioner's incompetence. The other respondents (the Caseys, subsequent purchasers) filed affidavits denying that they had known of petitioner's incompetence.

On these facts, the trial court granted summary judgment against the petitioner on all claims. App. D.

On a timely appeal to the Massachusetts Appeals Court, petitioner asserted his federal due process

claim in his brief and reply brief, and at oral argument.

In its first decision, rendered October 30, 1987, the Appeals Court affirmed the decision of the trial court on all claims. App. B. The court disposed of the due process issue in one sentence: (App. B, pp. B-10, B-11):

Appointment of a Guardian.

> "Reading as generously as possible the affidavits presented by the plaintiff which speak to certain emotional problems he was experiencing during the time period material hereto (A. 102-103), we conclude as matter of law that those statements are insufficient to raise a factual question

whether the plaintiff's due process rights were violated by the bank's failure to assure that he could comprehend the nature of the foreclosure proceedings. Compare Covey v. Somers, 351 U.S. 141, 145-146 (1956); Commonwealth v. Olivo, 369 Mass. 69-70 & n.6 (1975)."

On a timely petition to the Appeals Court for rehearing, the petitioner again asserted his due process claim. The Appeals Court granted rehearing and rendered a second, modified decision on February 23, 1988. App. C. In this decision, the court reversed the trial court's decision on the state-law issue of statutory notice, but again affirmed

the dismissal of the federal due process claim. App. C. at pp. C-8 - C-12, 25 Mass.App.Ct. 960 at 961-962, 519 N.E. 2d 775 at 776-777 (1988).

On a timely application to the Massachusetts Supreme Judicial Court for further appellate review of the second, modified decision of the Appeals Court, petitioner again pressed his due process claim. The Supreme Judicial Court denied review without opinion on April 28, 1988. App. A.[3]

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[3] The Supreme Judicial Court let stand the Appeals Court's reversal of summary judgment on the state-law question of statutory notice under M.G.L. c.244 sec. 14 and that issue is now pending before the trial court. Thus, there has not been a final judgment on all issues in the case. However, the state courts have rendered a "final judgment" on the federal claim for jurisdictional purposes under 28 U.S.C. §1257. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

Inasmuch as the Supreme Judicial Court denied review without opinion, this Court must look to the two Appeals Court opinions to discern the basis on which petitioner's due process claim has been dismissed on a summary judgment which was based upon the pleadings, the plaintiff's pro se deposition, and the affidavits referred to above.

In its first, one-sentence opinion on the federal claim, the Appeals Court seems to have taken the obviously mistaken view that the petitioner had not adduced enough facts to raise, for summary judgment purposes, a genuine issue of whether he was mentally competent at the time of the foreclosure. The claim was dispatched as merely alleging "emotional problems." App. B. at pages B-10, B-11.

In its modified opinion on rehearing, the Appeals Court implicitly recognized that petitioner had indeed shown enough facts to raise a genuine issue of his incompetence. App. C. at pages C-8 - C-12, Mass.App.Ct. at 961-962. This opinion instead seems to be based on the insufficiency of facts sufficient to warrant a trial on whether the respondents had known of petitioner's incompetence, thereby giving rise to a duty to inquire further and to seek the appointment of a guardian.

REASONS FOR GRANTING THE WRIT

The state court decision directly conflicts with the holding of Covey v. Somers, 351 U.S. 141 (1956).

In both of its opinions, the Massachusetts Appeals Court has decided the due process issue against the petitioner on a record which sets up facts falling directly within this Court's holding in Covey v. Somers, 351 U.S. 141 (1956). In that case, as in this case, the petitioner was a known incompetent at the time her property was taken by state action, and was later adjudicated to have been incompetent at that time.

The Appeals Court has cited Covey in both of its decisions, yet it has twice stated in conclusory fashion

that the facts adduced by the petitioner are insufficient to raise a factual question whether his due process rights were violated by the bank's failure to assure that he could comprehend the nature of the foreclosure proceedings, or its failure to seek the appointment of a guardian. The Appeals Court has not distinguished this case from Covey, and in both of its decisions it has ignored the record facts that the foreclosing bank and the respondent purchasers knew of his incompetence.

Those facts, together with the undisputed fact that the petitioner was adjudicated insane in 1984,[4] bring this case squarely within the Covey rule.

This Court has not addressed the special due process requirements pertaining to incompetent persons since its decision in Covey in 1956. The Court has continually expanded the general due process requirement established in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)--most recently in Mennonite Board of Missions v. Adams,

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[4] The second Appeals Court decision erroneously recited that he was adjudicated insane "in March 1980." App. C. at page C-8, 25 Mass.App.Ct. at 961. He was adjudicated in 1984 to have been insane beginning in March 1980.

462 U.S. 791 (1983) and in Tulsa Professional Collection Services, Inc. v. Pope, ___U.S.___, 108 S.Ct. 1340 (1988). The Court should not permit the state courts, contrary to the clear trend established by the Mullane line of cases, to ignore or erode the important holding of Covey v. Somers.

The Covey rule should be extended to protect incompetents by eliminating or restricting the "knowledge" requirement.

In the alternative, if this Court concludes that the petitioner has not adduced sufficient facts to affirmatively show that the respondents knew of his incompetence, the writ should nevertheless be granted to address

the questions of whether knowledge is essential to a due process claim--and if so, whether the burden on the knowledge issue was properly placed on the petitioner, rather than on the respondents.

There is a split of authority among the state courts as to whether knowledge of incompetence is an essential element of the Covey rule. Compare Stubbs v. Cummings, 336 So. 2d 412, 415-416 (Fla. Dist. Ct. App. 1976) (knowledge is required) with In re Consolidated Return of Tax Claim Bureau of the County of Delaware, 75 Pa. Commw. 108, 461 A.2d 1329, 1331-1332 (1983) (knowledge is not required to sustain a due process claim). See also Goldmyrtle Realty Corp. v. Woellner, 36 A.D. 968, 969, 321 N.Y.S. 2d 654, 655 (N.Y. 1971), and Sharon v. Kafka, 18

Mass.App.Ct. 541, 543-544, 468 N.E.2d 656, 658 (1984).

The petitioner has been put out of court on summary judgment based on his pro se pleadings, affidavits and depositions, and the foreclosing bank has not offered an affidavit or any other evidence to show that it did not know of his incompetence.

This Court should grant certiorari so as to clarify the important issues thus presented: (1) is knowledge of incompetence essential to the Covey rule?--and (2) if so, should the burden be placed on the incompetent to show such knowledge, or on those who take his property to negative such knowledge?

CONCLUSION

This Court should review this case because the decision below erodes the rule of Covey v. Somers, 351 U.S. 141 (1956); and alternatively, clarify the law, and eliminate the conflict between state courts on whether Covey requires knowledge of incompetence. For either of these reasons, this is a case of substantial importance and concern.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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(617) 725-1400

Dated: July 27, 1988

APPENDIX A

SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH

Office of the Clerk, 1412 Court House,
Boston, MA 02108 (617) 752-8055

No. FAR-4642 Date Apr. 28, 1988

In re MICHAEL T. HULL
vs.
ATTLEBORO SAVINGS BANK & others

The above-captioned Application for Further Appellate Review has been

DENIED

Jean M. Kennett,
Clerk

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

Appeals Court For The Commonwealth

At Boston, October 30, 1987

In The Case of

MICHAEL T. HULL

vs.

ATTLEBORO SAVINGS BANK & others.

pending in the Superior

Court for the County of Bristol

ORDERED, that the following entry be made in the docket; viz.,--

Judgment affirmed

By The Court,

/s/Nancy Turck Foley, Clerk.

October 30, 1987

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 86-892

MICHAEL T. HULL

vs.

ATTLEBORO SAVINGS BANK & others.[1]

MEMORANDUM AND ORDER

In 1982, the defendant Attleboro Savings Bank (the mortgagee) commenced foreclosure proceedings on property owned by the plaintiff (the mortgagor). Some three years later, the plaintiff brought this action against the bank and subsequent purchasers of the property (see note 1) seeking to set aside the foreclosure and sales. As the basis of his action, the plaintiff alleged that the bank had

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[1] Homemakers Financial Services, Inc., d/b/a GECC Financial Services, Edward F. Casey, Edward J. Casey, and Maria Y. Casey.

failed to comply with G. L. c. 244, § 14, had violated the automatic stay provision of 11 U.S.C. § 362(a)(1) of the Bankruptcy Act (1982), had acted in bad faith in not seeking the appointment of a guardian for the plaintiff when the bank knew or should have known that he was incapable of protecting his interests, and had failed to act in good faith and to exercise reasonable diligence. The defendants moved for summary judgment on the basis of the pleadings and excerpts from the plaintiff's deposition. The plaintiff filed affidavits in opposition to the motions, which were allowed. For substantially those reasons given by the judge in ordering summary judgment against the plaintiff, we affirm.

1. Notice under G. L. c. 244, § 14.

That portion of G. L. c. 244, § 14, as appearing in St. 1980, c. 318, § 2, upon which the plaintiff relies at pages twelve through fourteen of his brief, reads:

> "[N]o sale under such power shall be effectual to foreclose a mortgage, unless, previous to such sale, ... notice thereof has been sent by registered mail to the owner or owners of record of the equity of redemption as of thirty days prior to the date of sale, said notice to be mailed fourteen days prior to the date of sale ... to the last address of the owner or owners of the equity of redemption appearing on the records of the holder of the mortgage ..."

In paragraph eleven of his complaint (A. 9), the plaintiff alleged that the bank had failed to give notice as required by the statute. The bank denied the allegation (A. 32). In his affidavit in opposition to summary judgment, the plaintiff

stated: "I never received notice or was notified at any time that the Bank had filed a complaint in Land Court or that the Bank was going to foreclose on the property" (A. 103).

It does not follow from the plaintiff's assertion that he did not receive notice or that the bank failed to comply with the mandate of § 14. See Mutual Bank for Sav. v. Silverman, 12 Mass. App. Ct. 1059, 1060 (1982) (the "affidavit [] assert[s] no facts which place in issue whether these minimum requirements had been met"). Cf. Commonwealth v. Johnson, 348 Mass. 586, 588 (1965) ("There was no evidence requiring the finding that the citation if not 'delivered to the offender' or not otherwise received by him had not been 'mailed to him at

his mail address or his residential address' in accordance with the statute"). If the plaintiff needed any time to conduct discovery in order to present a sufficient affidavit on this point, that the bank had failed to mail the required notice, it was encumbent upon him to resort to Mass. R. Civ. P. 56(f), 365 Mass. 825 (1974). See A. John Cohen Ins. Agency, Inc. v. Middlesex Ins. Co., 8 Mass. App. Ct. 178, 183 (1979).

2. Violation of 11 U.S.C. § 362.

It appears that the plaintiff sought relief in the United States Bankruptcy Court for the District of Massachusetts in May 1982. Under 11 U.S.C. § 362(a), the mere filing of the petition operates as an automatic stay of certain acts specified in

that section. See generally Amonte v. Amonte, 17 Mass. App. Ct. 621, 623-624 (1984). While the stay was in effect, the bank filed a petition in the Land Court to comply with the Soldiers' and Sailors' Civil Relief Act. See 50 U.S.C. Appendix, § 532(3) (1982). Apparently, compliance with the Act was deemed effective on August 17, 1982. The bankruptcy petition was dismissed on August 24, 1982, thereby ending the automatic stay. See 11 U.S.C. § 362(C)(2)(b). The bank made entry upon the land for possession on August 25, 1982.

We assume without deciding that the bank's steps in the Land Court to proceed with foreclosure violated 11 U.S.C. § 362(a). The plaintiff argues that the foreclosure and the

foreclosure sale are void by reason of the violation. We do not agree.

The only act taken by the bank during the period in which the automatic stay was in effect was to commence proceedings under the Soldiers' and Sailors' Civil Relief Act. The sole issue presented in such proceedings is whether any interested party is entitled to the benefits of that Act by reason of military service. See Beaton v. Land Court, 367 Mass. 385, 390 (1975). However, nowhere does the plaintiff allege or suggest that he had been in or was recently released from military service and, thus, entitled to the benefits of that Act. Consequently, even assuming that compliance with the Act was void because it was sought and obtained

during the automatic stay period, the plaintiff made no showing that he was thereby entitled to relief. "If a foreclosure were otherwise properly made, failure to comply with the 1940 Relief Act would not render the foreclosure invalid as to anyone not entitled to the protection of that act. Fuleserian v. Pilgrim Trust Co., 331 Mass. 431, 433-434 (1954). See Park, Conveyancing, § 406 (1968) and Supp. 1974)." Beaton v. Land Court, 367 Mass. at 390. See also Boston Five Cents Sav. Bank v. Johnson, 3 Mass. App. Ct. 790 (1975); Park, Real Estate Law § 533 (1981) & Supp. 1987).

Additionally, we see nothing in 11 U.S.C. § 362 which requires that the foreclosure be invalidated because of a violation of the

automatic stay provision. Rather, as we read that statute the contemplated remedy appears to be limited to damages, costs, and attorneys' fees. See 11 U.S.C. § 362(h) (Supp. 1985).

3. Appointment of a Guardian.

Reading as generously as possible the affidavits presented by the plaintiff which speak to certain emotional problems he was experiencing during the time period material hereto (A. 102-103), we conclude as matter of law that those statements are insufficient to raise a factual question whether the plaintiff's due process rights were violated by the bank's failure to assure that he could comprehend the nature of the foreclosure proceedings. Compare Covey v. Somers, 351 U.S. 141, 145-146 (1956);

Commonwealth v. Olivo, 369 Mass. 62, 69-70 & n.6 (1975).

4. Good Faith and Reasonable Diligence

The plaintiff's allegations and deposition (A. 38-53) show that his claim that the bank failed to act in good faith and with reasonable diligence is based upon the following: (1) that the bank failed to take steps to protect his rights by seeking the appointment of a guardian to act on his behalf; (2) that the bank acted out of "envy" or "spite" (A. 40); (3) that the bank wasted money in hiring a security guard to protect the apparently vacant premises (A. 38-42); and (4) that the bank failed to make certain repairs to the property and "advertise[ ] the property better" (A. 42) so that it could have been sold at a higher price.

"A mortgagee in exercising a power of sale in a mortgage must act in good faith and use reasonable diligence to protect the interests of the mortgagor." Union Mkt. Natl. Bank v. Derderian, 318 Mass. 578, 581-582 (1945). However, as we review the plaintiff's claims in their totality, DesLauries v. Shea, 300 Mass. 30, 39 (1938), we see nothing which raises "questions of fact as to the reasonableness of the conduct of the ... [bank] and its agents in regard to the foreclosure sales on which reasonable minds could differ." Mutual Bank for Sav. v. Silverman, 13 Mass. App. Ct. at 1061. See generally, Kavolsky v. Kaufman, 273 Mass. 418, 422 (1930); Boyajian v. Hart, 284 Mass. 557, 558 (1933); DesLauries v. Shea, 300 Mass. at 37;

Sher v. South Shore Natl. Bank, 370 Mass. 400, 402-403 (1971). Compare Danielczuk v. Ferioli, 7 Mass. App. Ct. 914 (1979).

5. Motion to Amend.

In allowing the defendant's motion for summary judgment, the judge declined to rule on the plaintiff's motion to amend his complaint for the reason that the "result would not change were this court to allow" the motion (A. 135). It follows from what we have said that had the judge denied the motion, we would have found no error in his ruling.

Therefore, upon consideration of the record appendix, the briefs, and oral argument of the parties, and under the provisions of Rule 1:28 of this court, it is ordered that the

following entry be made upon the Superior Court docket in the above matter:

Judgment affirmed.

By the Court (Grant, Armstrong & Perretta, JJ.,

/s/Nancy Turck Foley
Clerk

Entered:
October 30, 1987.

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

Appeals Court for the Commonwealth

At Boston,
February 23, 1988

In the case of MICHAEL T. HULL

vs.

ATTLEBORO SAVINGS BANK & others

pending in the Superior Court for the County of Bristol

Ordered, that the following entry be made in the docket; viz, --

The judgment is reversed, and the case is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

By the Court,

/s/Warren L. Shields,
Assistant Clerk

February 13, 1988.

Bris. 86-892 Appeals Court

MICHAEL T. HULL
vs. ATTLEBORO SAVINGS BANK & others.[1]

No. 86-892. February 23, 1988.

Practice, Civil, Complaint, Summary Judgment. Bankruptcy, Stay of other proceedings. Mortgage, Real estate, Foreclosure.

After our decision in this matter (see 25 Mass. App. Ct. 1104 [1987]), we granted the plaintiff's petition for rehearing. We conclude that there is a genuine issue of material fact concerning compliance by the defendant Attleboro Savings Bank (the bank) with the notice provisions of G. L. c. 244, § 14, and

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[1] Homemakers Financial Services, Inc., Edward F. Casey, Edward J. Casey, and Maria Y. Casey.

reverse the judgment.

In 1982, the bank commenced foreclosure proceedings on the plaintiff's property. Some three years later, the plaintiff brought this action against the bank and the subsequent purchasers of the property (see note 1, supra) seeking to set aside the foreclosure and the subsequent sales. In his complaint (drafted pro se), the plaintiff alleged that the bank had failed to give him notice of the foreclosure proceedings and that the bank had acted in bad faith in not seeking the appointment of a guardian for him when it knew or should have known that he was incapable of protecting his interests.

The defendants answered to the complaint and also filed motions for summary judgment. The plaintiff thereafter filed affidavits in opposition to the motions as well as a motion for leave to amend his complaint by substituting an amended complaint drafted by counsel. The amended complaint more artfully repeated the plaintiff's earlier complaint and asserted additional claims: (1) that the bank had violated the automatic stay provision of 11 U.S.C. § 362(a)(1) (1982) (the Bankruptcy Act); (2) that the bank had sold the property for far less than its fair value; and (3) that these acts by the bank constituted bad faith and violations of G. L. c. 93A. It appears from the judge's memorandum of decision

that he took no action on the motion to amend the complaint based on his view that, even if the motion were allowed, the defendants would nonetheless be entitled to summary judgment. We consider the plaintiff's unverified amended complaint to the extent it assists us in comprehending his complaint upon which the defendants' motions are based. See Godbout v. Cousens, 396 Mass. 254, 262-263 (1985).

1. Violation of 11 U.S.C. § 362. The plaintiff alleges that he sought relief in the United States Bankruptcy Court for the District of Massachusetts in May of 1982. Under 11 U.S.C. § 362(a), the mere filing of the petition

operates as an automatic stay of certain acts specified in that section. See generally, Amonte v. Amonte, 17 Mass. App. Ct. 621, 623-624 (1984). While the stay was in effect, the bank filed a petition in the Land Court to comply with the Soldiers' and Sailors' Civil Relief Act (the Act). See 50 U.S.C. Appendix § 532(3) (1982). Apparently, compliance with the Act was deemed effective on August 17, 1982. The bankruptcy petition was dismissed on August 24, 1982, thereby ending the automatic stay. See 11 U.S.C. § 362(c)(2)(B) (1982). The bank made entry upon the land for possession on August 25, 1982.

Assuming without deciding that the bank violated the provisions of 11 U.S.C. § 362(a), it does not follow that the foreclosure and the foreclosure sale were void. As alleged by the plaintiff, the only action taken by the bank during the automatic stay period was to commence proceedings under the Act. The sole issue presented in such proceedings is whether any interested party is entitled to the benefits of the Act by reason of military service. See Beaton v. Land Court, 367 Mass. 385, 390 (1975). The plaintiff has never claimed that he was entitled to the benefits of the Act. Rather, his argument is that, as matter of law, the foreclosure is void because of the action taken by the bank during

the automatic stay period. See Irving Levitt Co. v. Sudbury Management Associates, Inc., 19 Mass. App. Ct. 12, 16 (1984). Because the plaintiff makes no claim of entitlement to the benefits of the Act, it gains him nothing to nullify the proceedings in the Land Court. "If a foreclosure were otherwise properly made, failure to comply with the 1940 Relief Act would not render the foreclosure invalid as to anyone not entitled to the protection of that act. Guleserian v. Pilgrim Trust Co., 331 Mass. 431, 433-434 (1954). See Park, Conveyancing § 406 (1968 and Supp. 1974)." Beaton v. Land Court, 367 Mass. at 390. See also Boston Five Cents Sav. Bank v. Johnson, 3 Mass. App. Ct. 790

(1975); Park, Real Estate Law § 522 (1981 and Supp. 1987).

2. Mental Incompetency. The plaintiff claims that there is a factual dispute on the issue whether the bank violated his statutory (G. L. c. 244, § 14 through § 17) and due process rights by foreclosing on his property when he was mentally incompetent without first seeking the appointment of a guardian. Although the plaintiff states in his complaint that he was "adjudicated insane" in March of 1980 for a mental illness "in remission since 1984," we do not see the existence of facts which, if established at trial, would entitle him to relief on this claim. See Kaitz v.

Foreign Motors, Inc., 25 Mass. App. Ct. 198, 200, 202 (1987); Orfirer v. Biswanger, 25 Mass. App. Ct. 928, 930-931 (1987). The affidavits submitted by the plaintiff in opposition to the motions speak to the facts that at the times relevant to the events of 1982, the plaintiff (then an attorney engaged in the practice of law) had not made payments on the mortgage note to the bank in over two years, that his behavior was "erratic" and "bizarre," that because of this behavior, his business associate and secretarial staff would no longer work with him, that in September (of 1982) he was admitted to a facility in Massachusetts known as Westwood Lodge, that in early September (1982) the

plaintiff's former business associate told a loan officer at the bank that the plaintiff had "financial" and "emotional problems," and that these two had a "further" conversation "relative to ... [the plaintiff] being institutionalized for his emotional problems in the month of September, 1982."

During his 1985 deposition, the plaintiff stated that at the times pertinent hereto, he was suffering from chronic depression and that there had been a newspaper article which the bank must have seen, reporting that in August, 1982, he had been indicted on charges of stealing his clients' funds and that he was being held without bail for a

psychiatric evaluation. The plaintiff further related that, at that time, he was involved in drug use in his attempts to cope with his depression. He stated that, after the indictment and upon the "recommendation" of his attorney and the court, his parents had him hospitalized at Westwood Lodge on or about September 9, 1982. Prior to that date, however, and after the bank had made entry upon the premises, he sought and obtained permission to enter the house to take his clothing. He (apparently) was at Westwood Lodge at the time of the foreclosure sale of the property to the defendant Homemakers Financial Services, Inc. (see note 1, supra).

Based upon these facts and Covey v. Town of Somers, 351 U.S. 141, 146-147 (1956), the plaintiff claims that there exists a question whether the bank, in light of the circumstances known to it, should have sought the appointment of a guardian to protect his interests during the foreclosure and sale. Accepting all the plaintiff's factual claims as true (see Kaitz v. Foreign Motors, Inc., 25 Mass. App. Ct. at 200, 202), we see no error in allowing the defendants' motions on this issue. See Commonwealth v. Olivo, 369 Mass. 62, 69, and 69-70 n.5 (1975); Boston v. Ditson, 4 Mass. App. Ct. 323, 326 (1976).

3. Good faith and reasonable diligence. In considering the plaintiff's claim that the bank violated its duty as a mortgagee, we, again, do not take into account the allegations set out in his unverified amended complaint. See Godbout v. Cousens, 396 Mass. at 262-263. We confine our review to his complaint, deposition, and the affidavits. Taken in the light most favorable to the plaintiff, these materials show: (a) that after the bank took possession of the property, it refused to allow the plaintiff onto the premises; (b) that the bank hired an armed security guard to protect the property twenty-four hours a day; (c) that the bank failed to repair a broken

glass door, to cut the grass, and to clean the inside of the house; (d) that the bank should have advertised the property more vigorously prior to its sale; and (e) that the defendant Homemakers Financial Services, Inc. (see note 1, supra) purchased the property from the bank for $125,000 and sold it to the other defendants for $170,000. These facts are not sufficient (see Kaitz v. Foreign Motors, Inc., 25 Mass. App. Ct. 200, 202) to create a factual question upon which reasonable minds could differ relative to the reasonableness of the bank's conduct in regard to the foreclosure sale. See DesLauries v. Shea, 300 Mass. 30, 39 (1938); Sher v. South Shore Bank, 360 Mass. 400, 402-403

(1971). Compare Danielczuk v. Ferioli, 7 Mass. App. Ct. 914 (1979); Mutual Bank for Sav. v. Silverman, 13 Mass. App. Ct. 1059, 1061 (1982). There was no error in allowing the defendants' motions on this claim.

4. Notice pursuant to G. L. c. 244, § 14. In his complaint, the plaintiff alleged that the bank failed to comply with the notice provisions of G. L. c. 244, § 14. The bank answered, denying the allegation. In moving for summary judgment, the bank relied upon the pleadings and the plaintiff's deposition, which is silent on this issue. The plaintiff stated in his affidavit in opposition to the motion

that he "never received notice or was notified at any time that the Bank had filed a complaint in Land Court or that the Bank was going to foreclose on the property." There here exists a disputed question of fact: whether thirty days prior to the date of the foreclosure sale, the bank sent notice thereof to the plaintiff. See G. L. c. 244, ¶ 14. In denying the plaintiff's allegation, the bank placed the claim in issue. It was the bank's burden on its motion to show that, in fact, it had sent notice to the plaintiff as required by the statute. See Attorney Gen. v. Bailey, 386 Mass. 367, 371, cert. denied, Bailey v. Bellotti, 459 U.S. 970 (1982); Davidson Pipe Supply Co. v. Johnson, 14 Mass. App.

Ct. 518, 524 (1982). Had the bank shown on its motion that it did mail the requisite notice, the plaintiff's averment of nonreceipt would have been irrelevant to the issue whether the bank had satisfied its obligation in accordance with the statute. See Mutual Bank for Sav. v. Silverman, 13 Mass. App. Ct. at 1060. Cf. Commonwealth v. Johnson, 348 Mass. 586, 588 (1965). However, reading the plaintiff's complaint and affidavit with the bank's simple denial, we conclude that a question of material fact exists on the issue of notice.

5. The motion to amend the complaint. As earlier noted, because of

the conclusions the judge reached on the motions for summary judgment, he found it unnecessary to rule upon the motion to amend the complaint. Our decision also would dispose of the motion to amend but for the fact that the plaintiff seeks to include a count under G. L. c. 93A. As there must be further proceedings on one of the plaintiff's claims (the bank's alleged failure to send notice), we leave it to a judge on remand to consider (if asked) whether the plaintiff should be allowed to amend his complaint by adding an allegation that the failure (if any) to send notice constitutes a violation of G. L. c. 93A.

The judgment is reversed, and the case is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

Ronald F. Kehoe (A. Neil Hartzell with him) for the plaintiff.
Stephen D. Clapp for Attleboro Savings Bank.
Max Volterra for Edward F. Casey & others.

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APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS. SUPERIOR COURT

CIVIL ACTION No. 19703

MICHAEL T. HULL,

Plaintiffs,

v.

ATTLEBORO SAVINGS BANK, HOMEMAKERS FINANCIAL SERVICES, INC., d/b/a GECC FINANCIAL SERVICES, and EDWARD F. CASEY, EDWARD J. CASEY and MARIA Y. CASEY,

Defendants.

MEMORANDUM OF DECISION
AND ORDER ON DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT

I. BACKGROUND

This action arises from a foreclosure by Defendant bank in August, 1982. Plaintiff alleges that his failure to make payments to the bank

according to the terms of the mortgage and note was due solely to his lack of mental capacity at that time. He further alleges the Defendants knew or should have known of his condition and they failed to appoint someone to protect his interests. The Plaintiff asks this court to require the bank to make an accounting pursuant to G.L. c.244, §20, and to set aside the foreclosure sale.

On February 7, 1986, the Plaintiff filed a motion for leave to amend his original complaint. In addition to the competency issue the Plaintiff adds three new counts. He alleges that the foreclosure took place in violation of the automatic stay provisions of 11 U.S.C. §362 (a)(1) of the Bankruptcy Act and that the bank failed to comply with the applicable notice provisions of G.L.

c.244, §14-17. He further alleges a G.L. c.93A violation. This court has not acted on this motion.

Defendants Attleboro Savings Bank and the Caseys have filed motions for summary judgment.

II. DISCUSSION

"A mortgagee exercising a power of a sale contained in a mortgage is bound to act in good faith and to exercise reasonable diligence to protect the interests of the mortgagor." Chantorand vs. Newton Trust Co., 296 Mass. 317, 320 (1937). The Plaintiff has the burden of proving that a sale was improperly conducted. Id. at 320. This court possesses broad power under the general principles of its equity jurisdiction "to reform, rescind, or cancel written instruments, including mortgages, on the

grounds such as fraud, mistake, accident or illegality." Beaton vs. Land Court, 376 Mass. 385, 392 (1975). In the case at bar, there is no dispute that the Plaintiff was in default on the note. Apparently, he had not made a payment in over two years. The bank exercised its power of sale in the mortgage and it entered the property on or about August 31, 1982. It complied with the provisions of 50 U.S.C. §432(3), the Soldiers' and Sailors' Civil Relief Act, when it obtained permission of the Land Court to allow the foreclosure. The bank did not take possession until after the Plaintiff's bankruptcy petition was dismissed by the Bankruptcy Court.

There is nothing in the record to support the Plaintiff's contention that the foreclosure was improperly conducted. None of his allegations rise

to the level of fraud, mistake, accident or illegality. On the facts here, the bank was under no obligation to appoint a guardian in order to protect the Plaintiff's interest in the property. The bank acted pursuant to the terms of the mortgage and this court can find nothing that requires a mortgagee to inquire into a mortgagor's level of competency during a foreclosure. The involvement of the Land Court does not change the result. That court's actions were independent of the actual foreclosure. Its sole function was to insure compliance with the Soldiers' and Sailors' Act. Beaton vs. Land Court, supra, at 390. Therefore, the Defendants' motions for summary judgment must be allowed.

This result would not change were this court to allow the Plaintiff's

motion to amend his complaint. While the Plaintiff is correct in his contention that foreclosure proceedings against property of an estate in bankruptcy violates the automatic stay provided by 11 U.S.C. §362, the issue before this court is whether such proceedings are void or voidable. In Re Oliver, 38 B.R. 245, 247 (Minn. 1985). The case law in this regard is inconsistent but this court is convinced that there is adequate support for finding such proceedings only voidable.

It is undisputed that the Plaintiff did not challenge the bank's actions during the pendency of his bankruptcy petition. It is also undisputed that the bank did not enter the property until the Plaintiff's bankruptcy petition was dismissed. This court can find no basis in law or in equity that

justifies recision of any of the bank's actions which are challenged some three years after the fact. The holding in Irving Levitt Co. vs. Sudbury Management Associates, Inc., 19 Mass. App. Ct. 12 (1984), is not controlling here. In Levitt, the Superior Court entered judgment in an action on a promissory note. In the case at bar, not only did the plaintiff wait almost three years to challenge the action, the type of judicial action taken is not comparable to the Superior Court's judgment in Levitt. Here, the Land Court made one determination: that the requirements of the Soldiers' and Sailors' Act was complied with. It did not validate the foreclosure. In addition, the defendant bank held up its entry and foreclosure sale until after the plaintiff's bankruptcy petition was dismissed.

Under the circumstances, I find that none of the bank's actions are void under 11 U.S.C. §362.

The claim that the bank failed to comply with the applicable notice provisions of G.L. c.244, §14-17 is without merit. The Plaintiff had failed to make mortgage payments for two years when the bank began foreclosure proceedings. He admits to notice of the bank's entry on or about August 31, 1982. His bare allegation, three years later, that he did not receive adequate notice of the foreclosure sale must fail.

ORDER

It is therefore ORDERED that the Defendants Attleboro Savings Bank and the Caseys' Motions for Summary Judgment be ALLOWED.

/s/ Roger B. Champagne
Roger B. Champagne,
Justice of the District Court Department, sitting in Superior Court by statutory authority.

Date entered: February 25, 1986

cc: Warner & Stackpole (Atty. Kehoe, Atty. Hartzell), Armstrong, Pollis & Clapp (Atty. Clapp) Max Volterra, Esq. Homemakers Financial Services, Inc. d/b/a GRECC Financial Services

APPENDIX E

AFFIDAVIT OF ROBERT A. PONTARELLI

Now comes Robert A. Pontarelli who under oath deposes and says as follows:

1. I reside at 455 Greenbush Road, Warwick, RI.

2. That I have known Attorney Hull since 1978.

3. That in August 1980, Attorney Hull's 1980 Mercedes 450 SL was involved in a motor vehicle accident in Attleboro, Mass.

4. That during the course of repairing the said vehicle, it was agreed between Attorney Hull and myself that because of the length of time necessary to receive parts from Germany, he could retain the insurance check and he would pledge his stock (25 shares) in Capron Associates, Inc., his law office building which also was owned by Edward F. Casey and others. This pledge agreement was given to me by Attorney Hull in November 1980 to secure the auto's repairs.

5. Subsequent to my receiving the said pledge of stock from Hull, I personally in December of 1980 appeared at Edward F. Casey's office at 224 County Street, Attleboro and advised him that I had voting rights and desired to be notified of all future corporate meetings.

6. Attorney Edward F. Casey advised me that Attorney Hull was removed from the office of President of the Corporation because of his bizzare and erratic behavior on, I believe, November 10, 1980. He further advised me Attorney Hull was not paying his rent to the corporation for his law office located at said 224 County Street, Attleboro and he further stated that Attorney Hull was crazy and may have a drug dependence problem and welcomed me as an owner of the said stock. An new "co-owner" although I was not the owner but only had a pledge agreement.

7. My future wife, Rhonda Kopecky, accompanied me on the above-mentioned date and is witness to this conversation with Attorney Edward F. Casey.

8. Subsequently, Hull defaulted on the pledge agreement and I received a judgment for the motor vehicle repairs in Rhode Island Superior Court.

9. I then encountered a dispute with the corporation as to my being a bonafide owner of the stock and had on occasion in late 1982 met with the son of Edward F. Casey, Edward J. Casey, who was the clerk and/or director of said Capron Associates, Inc. to determine if the stock ledger was changed to reflect me as owner of the said 25 shares of Capron. We discussed Attorney Hull, his problems, etc. his suspension from the practice of law, his financial difficulty and his bizzare behavior and possible drug use.

10. The dispute with Capron Associates, Inc. lead to my commencing a lawsuit against Attorney Hull and Capron Associates, Inc. and the other stockholders to establish my ownership in Case No. 140300 Superior Court, Norfolk County, Massachusetts and Judgment entered in that case whereby I was recognized as the owner of the stock which I thereafter sold to the corporation. At no time did Michael Hull sell his 25 shares or any interest in Capron Associates, Inc. to the Caseys or directly to the Capron Associates, Inc.

Sworn to under pains and penalties of perjury this 10th day of February, 1986.

/s/Robert A. Pontarelli

2/10/86

APPENDIX F

EXCERPTS FROM DEPOSITION OF
MICHAEL T. HULL at pp. 98-99

Now comes Robert A. Pontarelli who under oath deposes and says as follows:

APPENDIX F

EXCERPTS FROM DEPOSITION OF
MICHAEL T. HULL at pp. 98-99

Q Do you know of any facts that would cause you to believe the bank knew you had a medical problem?

A Yes. I spoke --

Q Before the indictment?

A Yes.

Q Before the indictment?

A Yes. They spoke to Dick Costa.

Q I'm talking about before the indictment in August.

A Yes.

Q I thought Dick Costa talked to them while you were in Westwood Lodge?

A He talked to them before that.

Q What did he say?

A Many times, three, four, five times, I think.

Q What did he say to them?

A I don't know, but he told me, recently. He was with me -- in fact, he was the one that got me permission to go on the property. They wouldn't let me go in to get my clothes.

Q This was in August of '82?

A That's right. He represented G.E., and, um, I think he had a key to the place. He was taking care of the place after G.E. purchased it, but he had a key before that, or made arrangements to show the property.

Q You think he told the bank that you were mentally ill?

A He told the bank. Yes, definitely.

Q He told the bank you were mentally ill?

A He definitely told them. No question about it. He might have characterized it as, "This guy isn't playing with a full deck," or, "He's crazy"; not that he's "mentally insane."

(2)

No. 88-224

In The
Supreme Court of the United States
October Term, 1988

MICHAEL T. HULL,

Petitioner,

v.

ATTLEBOROUGH SAVINGS BANK,

Respondent.

BRIEF OF ATTLEBOROUGH SAVINGS BANK IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

STEPHEN D. CLAPP
ARMSTRONG, POLLIS AND CLAPP
12 Church Street
North Attleborough, MA 02760
(508) 695-3554

Attorney for Respondent
Attleborough Savings Bank

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

ADDITIONAL PARTIES

This information is provided to meet the requirements of Supreme Court Rule 28.1. In 1987 Attleborough Savings Bank merged with Pawtucket Savings Bank to become Attleborough Pawtucket Savings Bank. Its non-wholly owned subsidiaries and affiliates are Mutual Advisory Corporation, First Systems Corporation and Baneware Incorporated.

Additional respondents are Edward F. Casey, Edward J. Casey and Maria Y. Casey.

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TABLE OF AUTHORITIES

STATEMENT OF THE CASE

The petitioner's Statement of the Case contains two inaccuracies which seriously affect the issues he intends to present. First, on page 8 the petitioner states that the summary judgment affidavits and depositions contained the fact that the petitioner "was adjudicated in 1984 to have been insane since March 1980 and continuing until the 1984 adjudication." Although this was one of the allegations of his complaint, it was not among the facts which were available to the state courts in passing upon the motions for summary judgment. This fact critically affects whether or not the state court decided or even reached the federal question.

Second, on page 5 the petitioner states that the foreclosure sale was "conducted pursuant to an authorizing judgment of a state court". What he characterizes as an authorizing judgment was an independent determination by the Massachusetts Land Court that there was no one entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act and did not in any way authorize, permit or validate the private foreclosure sale. This fact directly affects the element of state action, a necessary foundation for the petitioner's Fourteenth Amendment due process claim.

—o—

REASONS FOR DENYING THE PETITION

The petitioner invites the Court to grant the writ of certiorari in order to put an end to a perceived state court

erosion of the rule of *Covey v. Somers*, 351 U.S. 141 (1956) or in the alternative to extend the rule. Were the Court inclined to consider these matters, this case is not an opportunity to do so. The view of the facts properly taken by the state courts preempts the federal question. In any event the lack of state action precludes the "due process" claim.

I. The Federal Question Cannot Arise On The Facts Presented to the State Court.

The petitioner claims that he was entitled, under the rule of *Covey v. Somers*, to have a guardian appointed for him before his mortgage was foreclosed by the respondent-bank. In *Covey* it was held that due process required the appointment of a guardian for a known incompetent before a town could foreclose a real estate tax lien on her property.

In our case all of the petitioner's claims, except his claim that he was not given the foreclosure notice required by state law, were dismissed by the allowance of the respondents' motions for summary judgment. The trial court and the Massachusetts Appeals Court ruled that the facts to be considered on the motions for summary judgment were insufficient to establish his claim under the *Covey* rule. Brief of Petitioners at App. D-5; B-10; C-8-10.

The petitioner claims that the second Massachusetts Appeals Court decision takes the view that the facts in the summary judgment record establish that he was mentally incompetent at the time of the foreclosure. From this untenable footing his argument focuses upon what the respondents knew of his condition. A fair reading

of the decision shows that the Massachusetts Appeals Court concluded that the facts do not establish the petitioner's mental incompetence at the time of the foreclosure.

At page 8 of his petition, the petitioner injects into the proper summary judgment facts something which has no factual support in the record, "[t]hat he was adjudicated in 1984 to have been insane since March 1980 and continuing until the 1984 adjudication." This may have been a bare allegation in his unverified complaint, but it was not a fact making up the record upon which the motions for summary judgment had to be decided.

The Massachusetts Appeals Court explicitly drew a distinction between the allegation of incompetence in his complaint and the deficient summary judgment facts when it said: "[a]lthough the plaintiff states in his complaint that he was 'adjudicated insane' in March of 1980 for a mental illness 'in remission since 1984,' we do not see the existence of facts which, if established at trial, would entitle him to relief on this claim." Brief of Petitioner at App. C-8.

Rather than turning on the question of what the respondent-bank knew of the petitioner's mental condition, the Massachusetts Appeals Court decision focused on what the record showed the petitioner's mental condition to be, in the light most favorable to him. By citing page 69 and note 5 of *Commonwealth v. Olivo*, 369 Mass. 62, 337 N.E.2d 904 (1975), and page 326 of *Boston v. Ditson*, 4 Mass. App. Ct. 323, 348 N.E.2d 116 (1976), the Massachusetts Appeals Court surely meant that before any duty to appoint a guardian can arise the subject person must be shown to be incompetent at the very least. Brief of Petitioner at App.

C-12. Both the *Olivo* and the *Ditson* cases involved people who, although atypical, were not shown to be incompetent and thereby entitled to more than the usual notice provided for competent persons. The cited portions of both the *Olivo* and *Ditson* decisions specifically distinguished their facts concerning lack of competence with the facts involved in the *Covey* case. There can be little doubt that the Massachusetts Appeals Court found the summary judgment facts to fall short of showing the incompetence necessary to trigger the guardian appointment requirements of *Covey*.

Massachusetts case law supports the Appeals Court's view of the summary judgment facts. Although the facts must be viewed in the light most favorable to the petitioner on the issue of his mental capacity, the facts must be considered without the benefit of any opinions or conclusions of lay witness. *Commonwealth v. Spencer*, 212 Mass. 438, 447, 99 N.E. 226 (1912). Lay witness observations may be considered by the court in drawing the legal conclusion. *O'Brien v. Collins*, 315 Mass. 429, 435, 53 N.E.2d 222 (1944).'

The facts show that the petitioner was using drugs, neglecting his business, his clients, and his personal hygiene, engaged in bizarre and erratic behavior and having emotional problems. These facts would not support a finding of mental incompetence. *Taylor v. Creeley*, 257 Mass. 21, 29-30, 152 N.E. 3 (1926). The lay witnesses' opinions that he was "not playing with a full deck" and "crazy" were properly ignored. *Stanton Industries, Inc. v. Columbus Mills, Inc.*, 4 Mass. App. Ct. 793, 794, 344 N.E.2d 199 (1976), *Florio v. Kennedy*, 18 Mass. App. Ct. 917, 918, 455 N.E.2d 1230 (1984). Without factual support for the petitioner's claim of incompetence, the state courts could

not reach the federal question and were correct in distinguishing this case from *Covey*.

II. The Necessary "State Action" is Absent.

The Fourteenth Amendment of the Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." The Amendment is directed to the states and as such "can be violated only by conduct that may be fairly characterized as 'state action'." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 924 (1982).

On page 5 of the petition, the petitioner breezes over the state action requirement by the inaccurate statement that "[t]he foreclosure sale was conducted pursuant to an authorizing judgment of a state court." The record more accurately shows that, rather than being a judgment authorizing the foreclosure sale, the state court proceeding was merely a Land Court action limited to the purpose of ascertaining the existence of interested parties who were entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act § 532(3), 50 App. U.S.C. 501 (1982) by reason of their military service. Brief of Petitioner at App. C-6.

In the case of *Beaton v. Land Court*, 367 Mass. 385, 390, 326 N.E.2d 302 (1975) it was held that such proceedings are not in themselves mortgage foreclosure proceedings but rather occur independently of the actual foreclosure and any judicial determination of the general validity of the foreclosure; that the proceedings are simply a means for a mortgagee to make certain that there will be no cloud on the title following the foreclosure as a result

of an interested party having been in or just released from the military; and that failure to employ such proceedings would not invalidate the foreclosure as to anyone not entitled to the protection of the Act. In the *Beaton* case an interested party who was not entitled to the benefits of the Act attempted to file an answer in the Soldiers' and Sailors' equity proceeding seeking to raise defenses to the foreclosure apart from the Act. It was held that no one but a person in or recently released from the military service could appear or answer in such proceedings.

Because the petitioner was not entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act, he could not have appeared in the Land Court proceedings and therefore the proceeedings could have had no effect on any of his rights. Brief of Petitioner at App. C-7. The judgment arising out of the proceedings, in which the petitioner had no standing to participate, cannot operate as the necessary state action to support his Fourteenth Amendment due process claim. The Land Court proceeding could neither authorize nor prevent the foreclosure sale from occurring. The power of sale in the mortgage did not need court validation and the Land Court's determination had no bearing on the respondent's ability to carry out its power of sale. It was the exercise of the power of sale and not the Land Court judgment which deprived the petitioner of his property.

The strongest state action claim, it would seem the petitioner could make would be that he and the respondent-bank entered into a contract which provided that upon the petitioner's default the respondent could exercise the Statutory Power of Sale authorized by a state statute,

Mass. Gen. L. ch.183, § 21 (1987). As this Court established in the case of *Flagg Brothers, Inc. v. Brooks,* 436 U.S. 149, 164-165 (1978) the state is in no way responsible for a private creditor's decision to employ a statutory remedy to sell a debtor's property to satisfy its lien.

Neither the Land Court proceeding nor the existence of the statutory foreclosure remedy is governmental participation in the deprivation of the petitioner's property rights rising to the level of state action. Without state action there can be no violation of the Fourteenth Amendment right to due process and therefore no federal question to present.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for the writ of certiorari should be denied.

Respectfully submitted,

Stephen D. Clapp
Armstrong, Pollis and Clapp
12 Church Street
North Attleborough, MA 02760
(508) 695-3554

Attorney for Respondent
Attleborough Savings Bank

Dated August 31, 1988

88-224

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MICHAEL T. HULL,

Petitioner

vs.

ATTLEBORO SAVINGS BANK,
ET AL.,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI IN BEHALF OF EDWARD J. CASEY, MARIA Y. CASEY and EDWARD F. CASEY

Max Volterra, Esquire
VOLTERRA, GOLDBERG &
MANGIARATTI
Three Mill Street
Attleboro, MA 02703
(508) 222-1463

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Statutes and Authorities

COUNTERSTATEMENT

1. Petitioner is an attorney who filed the original action in his own behalf. (Appendix C-9) The respondents are private citizens and a private bank. Respondents Edward J. Casey, Maria Y. Casey, and Edward F. Casey purchased the property in question from the purchaser at the foreclosure sale, some eight months after the foreclosure sale. The only issue raised in this Court is the claim of a constitutional violation of due process on the theory that the respondent Bank violated due process by failing to have a guardian appointed for the allegedly incompetent petitioner at the time of the foreclosure.

The petitioner further argues that there ought to be no requirement that the respondent Bank must have knowledge of the alleged incompetence, and even if

there is a requirement of knowledge, that the burden of proof of the absence of knowledge should be on the respondent Bank.

REASONS FOR DENYING THE WRIT

1. The Petitioner has failed to establish any state action and therefore the constitutional claim of a lack of due process is not applicable.

In this case, it is undisputed that the respondents are private citizens and a private Bank. Clearly, these respondents are not associated with nor do they represent any government or governmental agency. The petitioner has not even attempted to establish state action, but merely assumed it. Petitioner's reliance on Covey v. Somers, 351 U.S. 141 (1956) is without any merit. In Covey, supra, the defendant Town of Somers was a municipality in the state of New York. Obviously, in that case state action was not in dispute.

Where private parties have allegedly violated constitutional rights, the

petitioner has a much more difficult burden. He must establish that the State has become involved in the conduct to a significant extent. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). This Court has said that it is only when the State so far insinuates itself into a position of interdependence that it becomes a joint participant, or where private conduct becomes so intertwined with governmental policies that a constitutional violation occurs. Evans v. Newton, 382 U.S. 296 (1966).

In this case, there are no governmental policies at work. The State has no interest in the outcome of this private dispute. The only involvement that the petitioner can possibly claim is that the respondent Bank used the court processes to protect any person's interest under the Soldiers and Sailors

Act, 50 U.S.C. App. Section 532. The Soldiers and Sailors Act has no bearing on the foreclosure process. It is merely a method of establishing clear title. In fact, the respondent Bank foreclosed on the mortgage by entry on the premises as provided by state law and subsequent sale by foreclosure.

The use of the court system to enable the private bank to clear the marketable title hardly measures up to joint participation, intertwined state policies, etc. It is obvious that the state had no interest in this matter, and played no role in the foreclosure.

For that reason alone, the petition for the writ ought to be denied. (Cf. Matter of Will of Cram, Supreme Court of Montana, 606 P.2d. 145 (1980).)

2. Knowledge of incompetency by the party taking possession of the

property is a prerequisite to any claim of due process violation based upon ineffective notice, and proof of same is upon the petitioner.

In Covey v. Somers, supra, this Court stated that if the Town knew that the person was incompetent, the Town must provide whatever necessary notice is required so that the incompetent's rights to redeem or file an answer would be protected. The Court stated that the claimant had been incompetent for 15 years and was wholly unable to comprehend the notice of the proceedings against her. Clearly, such facts demand judicial intervention.

However, in this case, the petitioner is a lawyer, who claims that it was known that he was acting in an "erratic" and "bizarre" manner, people could not work with him, he was admitted

to a facility, and that he had financial and emotional problems. He claimed to be suffering from depression and involved in drugs. Before entering the above facility, he admitted seeking and obtaining permission to enter his home to get his clothing. None of these allegations compare with those in the Covey case. In fact, as the Massachusetts Supreme Judicial Court pointed out, in Commonwealth v. Olivo, 369 Mass. 62 (1975), notice is sufficient if a person even though under disability receives notice that would put a reasonable person on notice that inquiry is required, and the party's disability does not render him incapable of understanding the need for such inquiry.

In this case, the petitioner is an attorney. He knew enough to seek permission from the Bank to enter the

home in question and remove his clothes. He was not institutionalized other than by his own volition for a short time. Clearly, this claim of due process violation does not measure up to the facts set forth in the Covey case.

With respect to the burden of proof, it has long been the law that the party making a claim ought to carry the burden of proving that claim. This case is no different.

CONCLUSION

For all these reasons, the defendants Casey say that the Writ ought not be granted.

Max Volterra
VOLTERRA, GOLDBERG &
MANGIARATTI
Three Mill Street
Attleboro, MA 02703
(508) 222-1363

August 29, 1988

CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing "Brief in Opposition to Petition for a Writ of Certiorari in Behalf of Edward J. Casey, Maria Y. Casey, and Edward F. Casey" upon counsel for all parties by placing three copies thereof in the United States mail, first-class postage prepaid, properly addressed, to each of the following attorneys for said parties:

Stephen D. Clapp, Esquire
Armstrong, Pollis & Clapp
12 Church Street
North Attleborough, MA 02760

Ronald F. Kehoe, Esquire
WARNER & STACKPOLE
28 State Street
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Max Volterra
Attorney for Respondents
Edward J. Casey,
Maria Y. Casey, and
Edward F. Casey

August 31, 1988